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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 391.

THADDEUS G. BENTON,
Petitioner,

vs.

VINSON, ELKINS, WEEMS AND SEARLS, A PARTNERSHIP OF LAWYERS COMPOSED OF JAMES A. ELKINS, WHARTON E. WEEMS, WARREN JEFFERSON DALE, DAVID T. SEARLS ET AL., AND EACH OF THE MEMBERS OF SAID PARTNERSHIP, INDIVIDUALLY, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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THADDEUS G. BENTON,
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VINSON, ELKINS, WEEMS AND SEARLS, A PARTNERSHIP OF LAWYERS COMPOSED OF JAMES A. ELKINS, WHARTON E. WEEMS, WARREN JEFFERSON DALE, DAVID T. SEARLS ET AL., AND EACH OF THE MEMBERS OF SAID PARTNERSHIP, INDIVIDUALLY, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Your petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit entered in the above action May 28, 1958 (App. 1A) affirming the judgment of the United States District Court for the Southern District of New York

denying petitioner's motion under Federal Rule of Civil Procedure 60 (b) for relief, due to mistake and inadvertence—seeking the withdrawal of his voluntary notice of dismissal of the action, an order vacating an order transferring the action to Texas, and leave to file an amended complaint (Ptr's separate append., pp. 8-13).

A petition for rehearing was duly filed, and denied by *per curiam* opinion on June 23, 1958 (App. 3A).

The decisions below are contradictory of fundamental law as repeatedly affirmed by this court, dealing with the transfer of actions to other states under section 1404 (a), Title 28, U. S. C., and with relief from mistakes and inadvertence under Federal Rule of Civil Procedure 60 (b); and, unless reversed, will operate to complicate and confuse the administration of justice in the federal courts, and to destroy private rights of substantial value.

OPINIONS BELOW.

The opinion of the District Court is not reported in Federal Supplement. The District Court's order appears at page 7 of petitioner's separate appendix, and its long form order appears at page 68 of Appendix to brief of appellee in the court below.

The opinion of the United States Court of Appeals appears at 225 F. 2d 299 (See App. p. 1A).

JURISDICTION.

The judgment of the United States Court of Appeals was entered May 28, 1958. Petition for rehearing was denied June 23, 1958, reading: "*Per Curiam*: Petition for rehearing denied."

Sections 2101 (c) and 1254 of Title 28 U. S. C. are believed to confer jurisdiction on this court to review the judgment by writ of certiorari.

QUESTIONS PRESENTED.

The basic, and substantial question presented is whether a litigant's right to the trial of his action in the state of his residence should be destroyed by the mistake of the trial court and the litigant and his attorneys. Such substantial question is determinable by the answers to four subdivisions:

1. Whether an order of the United States District Court for the Southern District of New York transferring the action to the United States District Court for the Southern District of Texas, pursuant to section 1404 (a), Title 28 U. S. C., was void because the action "might" not "have been brought" in Texas because of its two-year statute of limitations which barred the action, which is the essential condition of the statute permitting the transfer, *i. e.*, only if the action "might have been brought" in such transferee jurisdiction.

2. Whether the United States District Court abused any discretion it had under Federal Rule of Civil Procedure 60 (b) (1) in not reinstating the discontinued action, following petitioner's voluntary discontinuance of the action because of its transfer to Texas which transfer was made by the mistake and inadvertence of the court and petitioner in not having recognized that the action "might" not "have been brought" in Texas because of its two-year statute of limitations.

3. Whether the United States Court of Appeals ignored and nullified the intent of Federal Rule of Civil Procedure

60 (b) that "any mistake, inadvertence, surprise or excusable neglect", including mistakes of *law* and fact, are grounds for relief under that rule.

4. Whether the United States Court of Appeals abdicated its judicial function in not adjudicating whether the Texas or the New York statute of limitations would apply to the action if transferred to Texas—an essential condition to any decision.

Petitioner most sincerely urges that each question can be properly answered only in the affirmative.

STATEMENT OF THE CASE.

Petitioner, a resident of New York, commenced this action in the Supreme Court of New York by personal service of process upon respondent Searls, a member of defendant partnership. Respondents removed the action to the United States District Court for the Southern District of New York.

The complaint alleged three causes of action:

1. That defendants as attorneys for one Blair in an action in the United States District Court for the Southern District of Texas, seeking recovery of petitioner's share of partnership assets worth $1,000,000, knowingly misrepresented to the trial court material facts and the contents of documentary evidence in violation of the federal penal statute, and caused the trial judge to believe such facts and to enter a clearly erroneous judgment against petitioner as held by the United States Court of Appeals for the Fifth Circuit, to the damage of plaintiff of $25,000.

2. That respondents in procuring such erroneous judgment tortiously and wrongfully caused the defendant

Blair to breach his agreement with petitioner not to dispose of the partnership assets pending final disposition of such action, and permitted Blair to dispose of such assets, including an assignment to respondent Searls, to the damage of petitioner of $1,000,000.

3. That respondents caused the trial judge in *Benton v. Blair* to have a bent and prejudiced mind against plaintiff, and to have an arbitrary and mistaken belief that the said action should be decided in favor of Blair irrespective of the evidence compelling a judgment for petitioner, which the trial judge did; that thereafter the trial judge wrongfully permitted plaintiff's counsel to withdraw without proper notice to plaintiff (for illness) and when it was impossible for plaintiff to obtain substitute trial counsel; that thereafter on appeal to the United States Court of Appeals for the Fifth Circuit that court held that the judgment of the trial judge was clearly erroneous and remanded the case "for a further trial of the issues" which meant of course that unless Blair could overcome the evidence for the plaintiff judgment should be entered for the plaintiff; that thereafter the said trial judge's mind was irrevocably fixed as against plaintiff, that he refused to recuse himself upon the filing of plaintiff's affidavit of prejudice, and insisted upon the granting of a whole new trial in violation of the mandate of the United States Court of Appeals, he denied plaintiff the right personally to try the action in violation of the Federal statute made and provided, he insisted that plaintiff obtain a Texas lawyer to represent him which plaintiff could not do because of defendant's and the trial judge's influence; and he evinced his purpose not to conduct the further trial fairly and dispassionately but to decide the facts against the plaintiff; that defendants, under the comfort of the acts of the trial judge, refused to recognize the just rights of plaintiff be-

cause they were assured that the trial judge would again make a conclusive fact finding against the plaintiff which would defeat his cause of action, knowing that they had succeeded in having the trial judge conclusively prejudge the case; that except for the facts aforesaid plaintiff would have recovered judgment against Blair for approximately $1,000,000; and that plaintiff was thereby coerced under duress to compromise his action against Blair for $21,137.50 compared with its true value of approximately $1,000,000.

January 10, 1957, respondent Searls moved the District Court to transfer the action to Texas under Section 1404, Title 28, U. S. C., in the interest of justice and for convenience of respondents. Petitioner's affidavits of January 27 and 28, 1957, opposed the motion (R. 186-191, 211-214). Upon argument of the motion on January 18, 1957, plaintiff filed his cross motion for summary judgment on the issue of liability, based upon his affidavit and the record of proceedings in *Benton* v. *Blair*.

February 28, 1957, the trial judge (Hon. Sylvester J. Ryan) granted respondent's motion to transfer the action to Texas, and denied petitioner's motion for summary judgment on the ground that "Without answers made and issue joined we are not in a position to say that factual issues are not present on the question of liability; nor do we now hold that plaintiff's complaint states a claim entitling him to relief." (Appendix to respondent's brief, p. 55). Without hearing upon petitioner's motion for rehearing of the motion to transfer the action to Texas, the trial judge on March 11, 1957, entered formal orders.

The trial judge had accepted the first and second causes of action as stating proper claims for relief, but held that the third cause of action was contumacious of the United States District Court in Texas (Appendix to respondent's

brief, pp. 60-63). It is clear from the trial judge's opinion that it was the third cause of action which was the principal reason for ordering the action transferred to Texas. Such third cause of action has been eliminated from the tendered amended complaint with the petitioner's motion seeking to vacate the order of transfer. There is thus presented in the tendered amended complaint two simple causes of action based on tortious conduct of the respondent Searls alone, as evidenced conclusively by the certified record in the action of *Benton* v. *Blair* and, by clear deduction, by the decision of the United States Court of Appeals for the Fifth Circuit. Petitioner has thus eliminated from the tendered amended complaint any valid ground for transferring the action to Texas, even if the action "might" have been "brought" there in the first instance which could not have been because of the two-year Texas statute of limitations.

The United States Court of Appeals for the Second Circuit on April 16, 1957, by *per curiam* decision, without opinion, denied petitioner's application for a writ prohibiting the transfer of the action to Texas.

Before the mandate of the Court of Appeals was received in the District Court, and before the record was transferred to Texas, petitioner filed his voluntary dismissal of the action pursuant to Federal Rule 41 (a) (1).

Respondent's motion to vacate the notice of dismissal was at first granted, but on June 24, 1957, was denied upon rehearing (R. 328-333).

When the action was still pending in the District Court (following the first order vacating petitioner's notice of dismissal), the District Court on June 19, 1957, directed respondents to show cause why the court should not grant (a) leave to petitioner to file an amended complaint con-

taining only the first two causes of action (stripped of the third cause which caused Judge Ryan to order the action transferred to Texas), and order the action retained in the New York jurisdiction, and (b) leave to petitioner to withdraw the notice of dismissal.

Petitioner's application for the above show cause order of June 19, 1957, was timely made—less than two months following petitioner's notice of dismissal on April 26, 1957, so that respondents were not prejudiced.

The grounds for petitioner's application were:

1. That the trial court and petitioner made inadvertent mistakes in not observing that the two-year statute of limitations would bar the action in Texas, whereas the New York three-year limitation would definitely not bar the action; and that, therefore, as the action "might" not "have been brought" in Texas under section 1404 (a), Title 28, U. S. C., there was no authority for the transfer.

2. That petitioner, having eliminated in the tendered amended complaint, the third cause of action which prompted the order of transfer, there was no valid ground for transferring the action.

3. That inasmuch as petitioner was entitled to summary judgment based on the certified record in *Benton v. Blair*, the interests of justice and the convenience of the parties required that the action be tried in New York, the residence of petitioner. (The grounds for the motion are stated more fully in Brief for Appellant and Appendix in the Court of Appeals, at pp. 3-4 of the Brief.)

July 12, 1957, the District Court denied the application on the stated, erroneous ground that because of plaintiff's voluntary dismissal no action was pending (R. 327A). October 17, 1957, the United States Court of Appeals

unanimously reversed the order of the District Court, and held that the trial court should decide the motion to vacate the notice of dismissal and then consider the request to file the amended complaint and for an order retaining jurisdiction in the New York court (R. 386-388).

The record is barren of any evidence that the bar of the Texas two-year statute of limitations was considered by the District Court or the Court of Appeals or the parties, as was essential to a determination under section 1404 (a), Title 28, U. S. C., that the action could have been brought or maintained in Texas at the time instituted.

THE ABUSE OF DISCRETION BY THE DISTRICT JUDGE.

Thereupon petitioner's motion brought on for hearing by the court's show cause order of June 20, 1957, was noticed for hearing on November 21, 1957, in conformity with the decision of the United States Court of Appeals. District Judge Herlands presided. All the papers were before the court. The motion had never been adjudicated on the merits.

So that plaintiff's motion consisting of plaintiff's affidavit, and Judge Dawson's order to show cause, were properly the subject for decision in conformity with the decision of the Court of Appeals. The motion had never been adjudicated. It had been made precisely in conformity with Federal Rule 6(d), and defendant and the court knew exactly what motion was before the court for decision. And Judge Herlands should have known fully the subject matter because on November 19, 1957, he had entered the order adopting the decision of the Court of Appeals (R. 391-3). Despite the fact that the motion papers, including the affidavit, were properly before the court,

Judge Herlands erroneously declared that the motion papers were defective simply because the motion was *not repeated* in typewritten form (R. 470-471; App. 30-31). Yet, he later assumed that the papers were properly before him (App. 31-35).

The hearing had been adjourned by consent to November 26, 1957. On that date, the motion was argued, and was inconsiderately, impetuously and impulsively denied in its entirety by Judge Herlands (App. 35; R. 444-481) without the court having even read (a) the motion of plaintiff of June 19, 1957, and his accompanying affidavit (App. 7-13; R. 320-327) or (b) the "plaintiff's memorandum on motion for leave to file amended complaint, etc." filed at the hearing on November 26, 1957 (R. 394-411; Tr. of hearing, R. 443-481, App. 17-36) nor did the court read the answering affidavit of Leo T. Kissam, Esq., of November 26, 1957, consisting of 10 pages and exhibits (R. 412-442). The hearing lasted only not more than approximately thirty minutes.

Plaintiff's affidavit of June 19, 1957, consisted of nine pages and contained his motion, the tendered amended complaint, the factual reasons for the motion, the facts showing that the tortious acts of defendant Searls, in the action of *Benton* v. *Blair*, occurred as early as December 5, 1953, and June, 1954 (plaintiff's affidavit on motion for summary judgment, R. 101-102), whereas this action was not commenced until November 27, 1956, more than two years thereafter (R. 320-327). The affidavit contained the numerous cogent reasons why the action as represented by the limited two causes of action of the amended complaint (eliminating the third cause of action of the original complaint which was the reason for Judge Ryan ordering the transfer of the original action to Texas) should not be transferred to Texas, as hereinabove set forth, in-

cluding the irreparable injury to plaintiff represented by the belief that he would be forever barred from an adjudication of his claim because of the Texas statute of limitations, and plaintiff's inability to obtain service of process on defendants in New York because defendants are all residents of Texas.

Plaintiff's memorandum on the motion, consisting of 17 pages (R. 394-411) was filed with Judge Herlands at the commencement of the hearing of the motion on November 26, 1957. It treated fully the facts supporting the motion, it showed that the reason for the court's earlier order transferring the original complaint to Texas was the third cause of action alleging that the Texas judge had been the subject of influence (which third cause of action is entirely eliminated from the amended complaint), it described the ten documents relied upon by plaintiff for the motion, it showed the compelling grounds for the granting of plaintiff's motion, the law supporting plaintiff's motion, and that it would be unconscionable to deny plaintiff a trial of the amended complaint in the New York forum of plaintiff's residence, which is the only jurisdiction available to him, and that plaintiff's right to a hearing upon his claims would be forever lost if the motion should not be granted (R. 394-411).

The hearing was reported (App. 17-36; R. 443-481).

As Judge Herlands had not read plaintiff's motion and memorandum supporting the motion, he undertook to adjudicate the motion on the brief oral summary presentation by counsel, which of course did not cover the full facts (App. 17-36; R. 443-481). Plaintiff explicitly stated to Judge Herlands that his affidavit containing the motion was annexed to Judge Dawson's order to show cause in the record (R. 320-327; App. 22; R. 454-455); and the

plaintiff had stated at the oral hearing that there *were a lot of facts which he "would leave for your Honor's notation of them better on papers that will be before your Honor"* (App. 20; R. 451), so that Judge Herlands did not have in his mind all the facts stated in the motion papers in reaching his impetuous decision on the motion.

Instead of reading plaintiff's sworn motion and plaintiff's Memorandum thereon, Judge Herlands sought, at the oral hearing, to obtain *a mere summary* of the grounds for the motion. He asked that he be informed *"in headline form* what you (appellant) regard as the specific reasons why you should be relieved of this discontinuance." (App. 26; R. 462) *and then insisted on hearing from defendant's counsel—cutting off the plaintiff* (App. 27; R. 464).

Thereupon, counsel to defendant made orally certain misstatements to Judge Herlands, which Judge Herlands was manifestly unable to reconcile with the actual facts in his quick and impulsive determination, but which *misstatements he had doubtless absorbed*, as follows:

1. "That he (Mr. Benton) has made statements to your Honor which are wholly unsupported by any papers before your Honor." (App. 27; R. 464). The statement was arbitrary, it was not supported by any showing and could not be supported by any showing.

2. "There was no *such finding* by the court in Texas" (R. 465; App. 28), without stating what finding by the court in Texas he referred to. But he doubtless referred to plaintiff's statement (App. 20; R. 450) that the Court of Appeals (in *Benton* v. *Blair*, 5th Circuit) held squarely in a 16 page written opinion that the plaintiff "had established a *prima facie* case of his contract of co-partnership and it remanded the case." Such statement is absolutely correct: *Benton* v. *Blair*, 228 F. 2d 55. So that counsel to

defendants misled Judge Herlands, and the Judge did nothing to ascertain the real facts.

3. That Judge Herlands had "one piece of paper before you" meaning the mere notice of the hearing of the motion (App. 28; R. 465). The truth is that the court had before it Judge Dawson's order to show cause of June 19, 1957, and plaintiff's accompanying affidavit containing the motion (App. 7-13; R. 320-327). And it had plaintiff's comprehensive memorandum.

4. "The record shows that he (plaintiff) was not represented by one lawyer but by two lawyers". (App. 28; R. 466). The statement is misleading. Plaintiff's trial counsel, Mr. Williams, had become ill, and withdrew before the appeal was made in *Benton* v. *Blair*, and later died (R. 16-18); and plaintiff was unable to obtain other Texas trial counsel; but was able to obtain only the services of lawyer Cunningham in Houston to appear only for a pretrial hearing on March 12, 1956, in Texas, and as mere local counsel of record (R. 21). The only other legal adviser plaintiff had in the Texas case was Lawrence W. Krieger, Esquire, of New York who annexed his affidavit of good faith to plaintiff's affidavit of prejudice against the Texas judge, Judge Connally (R. 195-207). Mr. Krieger was, naturally, as a New York lawyer, ill prepared to try the action in Texas although it was thought of as an emergency measure.

5. "But every single witness besides Mr. Benton is in Texas." (App. 28; R. 466). Plaintiff has shown that the certified record in *Benton* v. *Blair* in Texas conclusively proves the tortious conduct of defendant Searls in *Benton* v. *Blair*, the subject of this action (App. 8-10; R. 321-323). And plaintiff has shown that no amount of testimony of Texans can change that result. Plaintiff has also shown

that there are approximately 10 witnesses in New York competent to testify to the facts of the case (R. 186-187).

6. "You are not going to find * * * anything in Mr. Benton's papers or our papers that has to do with the statute of limitations. You will find it in our opposing affidavit today." (App. 32). The statement is reckless, and a gross misstatement, that must have misled the court. Plaintiff's affidavit annexed to Judge Dawson's show cause order of June 19, 1957 (App. 7-13; R. 320-327), shows the facts which would bring the Texas statute of limitations into play and probably bar the claim there. In addition, "Plaintiff's memorandum on Motion for Leave to File Amended Complaint, etc." filed at the hearing before Judge Herlands showed the court that the Texas two-year statute of limitations would probably bar the action in Texas, whereas the New York three year statute of limitations would definitely not bar the action (R. 394-411). The memorandum set forth the Texas statute of limitations, and the decision of Judge Weinfeld of the United States District Court for the Southern District of New York *that even if a plaintiff be mistaken as to the law of the statute of limitations of the transferee state "plaintiff should not be exposed to such a possibility"* of the operation of the statute of limitations. *Curry* v. *States Marine Corp.*, (1953) 118 F. Supp. 234. In addition, there was before the court plaintiff's affidavit of August 6, 1957, showing that the Texas statute of limitations was not considered upon the hearing before Judge Ryan of defendants' motion to transfer (R. 350-351; App. 20).

7. "When the motion was argued before Judge Ryan, Judge Ryan, not I, asked whether any Texas statute of limitations was involved". (R. 472; App. 32). Appellant's affidavit of August 6, 1957 (App. 16-17; R. 350-351) shows:

> "Plaintiff has no recollection whatever that the Texas statute of limitations was raised by Judge Ryan, or counsel, on January 18, 1957, or at any time when the subject was considered by Judge Ryan, for if the question had been raised it would have been researched and brought to Judge Ryan's attention and treated in the briefs. There is no mention whatever of the statute of limitations in Judge Ryan's opinion, or the affidavits and briefs of the parties (before Judge Ryan). I am therefore convinced that Mr. O'Loughlin is mistaken in saying that Judge Ryan had specifically raised the question of the statute of liimtations."

There is not one word in the record of these proceedings indicating that anyone considered the question of the application of the Texas statute of limitations, until appellant's instant motion was made to relieve him from his mistake and the mistake of Judge Ryan in not noting the probable application of limitations in Texas; and, of course, the question was not raised before Judge Ryan. But even if slight mention of it could have been made there is not one word in the record indicating that it was really considered or determined; and it is hereinabove and hereinafter shown that it would most probably bar the action in Texas.

8. Defendants' counsel's statement that plaintiff would have been barred from raising the Texas statute of limitations because reargument of defendant's motion to transfer was not made within 14 days from the order of transfer (App. 33; R. 474): The statement is erroneous, and baseless, because Federal Rule 60 (b) expressly allows application to be made to correct a mistake at any time within one year.

9. "He (plaintiff) is not hurt" by the discontinuance; "there is no prejudice to it. If he has a cause of action, he can start it in New York or in Texas." (App. 33-34; R. 475-

479). That is another gross misstatement by defendants' counsel. The Texas two-year statute of limitations probably barred the action when this action was commenced. It would most certainly bar the action if brought now. Plaintiff cannot obtain service in New York on defendants, for defendants are all residents of Texas.

The foregoing numerous misstatements of material facts to the court by defendants' counsel are bound to have had their effect, as Judge Herlands freely admitted that he had not read the motion papers, or plaintiff's extensive Memorandum. During the very limited time permitted for the argument, Judge Herlands merely "GLANCED AT THE PERTINENT PAPERS AND DECISIONS." (App. 34; R. 476).

Thereupon plaintiff reminded the court that his Memorandum listed the ten documents then before the court upon which plaintiff relied (App. 34; R. 394-411, p. 10). *Judge Herlands ignored such record facts, and of course did not consider all the true facts.* He declined even to read plaintiff's affidavit containing the instant motion, which is annexed to Judge Dawson's show cause order (App. 34; R. 320-327, 477). He mistakenly proceeded upon the erroneous assumption that plaintiff had not presented his grounds for the motion in affidavit form, without examining the very motion that was before him for adjudication (App. 34; R. 477).

Thereupon Judge Herlands, without considering the carefully drawn motion in affidavit form, or plaintiff's Memorandum presented to him at the commencement of the argument, and following the short, summary argument of the parties, inconsiderately, impulsively and impetuously ruled that, even assuming all the facts stated by plaintiff in oral presentation were true, plaintiff had not

made out a case *requiring* the court to vacate the notice of dismissal and to allow the filing of the amended complaint (App. 35; R. 478).

As Federal Civil Rule 60 (b) contemplates that the District Judge should sit as a chancellor, it is at once manifest that Judge Herlands' inconsiderate, impetuous and impulsive action did not conform to that requirement of law and equity for a fair, full and informed hearing.

The court's action had doubtless been induced largely by the mistaken assertions by Mr. Kissam, *supra*, for, after his adverse ruling was given, Judge Herlands declared that plaintiff could start a brand new action in New York (App. 35; R. 478-479)—*a palpable mistake as induced by Mr. Kissam*—wholly overlooking the fact that plaintiff could not obtain service on the defendant Texans in New York.

After being reminded that there is not one word in the record indicating that the bar of the Texas statute of limitations had been noted in the earlier proceedings, Judge Herlands *assumed such fact to be correct*, but then wholly and inconsistently said that "I don't think there was a mistake" without any factual basis whatever for his conclusion (App. 36; R. 480).

Judge Herlands then concluded that, after considering all the facts referred to in argument and

> "the facts set forth *in the affidavits* here, *considering the total record*, it seems to me that this is not a case that should appeal to the conscience of the court."

The statement is erroneous, it is untrue, it was impossible for the judge to have considered all such facts. He didn't even read the moving affidavit. Yet, he denied the motion in its entirety (App. 36; R. 481; hearing of November 26, 1957).

On the same day, November 26, 1957, Judge Herlands endorsed on plaintiff's notice of the hearing of the motion pursuant to the decision of this court:

> "11-26-57. Motion denied in its entirety. SO ORDERED. Herlands, J." (R. 390).

Despite the fact that the foregoing decision and entry by Judge Herlands constituted the "order" of the court (General Rule 10, U. S. District Court), defendant served on December 4, 1957, a proposed "long form order" "so that, should an appeal be made, the Circuit Court will be fully acquainted with the *circumstances and considerations* which lead to the denial of the motion." (R. 483-484).

Before the scheduled time and date for the presentation of such long form of order for settlement on December 6, 1957, at 10 A. M., plaintiff at 9:37 A. M. on December 6, 1957, filed his notice of appeal herein. Plaintiff at the same time filed his "Objections" to defendants' submitted long form order, stated that the judgment of the court had been announced and entered on November 26, 1957, and stated that the court had not actually read the affidavits described in the long form of order. Plaintiff called attention to the fact that while the long form of order *mistakenly* recited that the court had read the affidavits of Messrs. Kissam and O'Loughlin, it *properly* did not recite that the court had read plaintiff's affidavit of June 19, 1957, annexed to the show cause order of Judge Dawson. Plaintiff further noted that he had, before 10 A. M. on December 6, 1957, filed his notice of appeal to this court. Plaintiff then urged that the long form of order "should be considered with extreme caution", because the transcript of the hearing before Judge Herlands fully showed the limited circumstances and considerations which led to the extemporaneous decision and order of the court on November 26, 1957 (App. 17-36; R. 485-489).

Upon the filing of the notice of appeal before the long form order was presented to Judge Herlands, the District Court lost jurisdiction of the matter, and could not validly enter an order stating that it did what it did not do in reaching the decision and in entering the first order on November 26, 1957. Plaintiff thus believes strongly that the presentation to Judge Herlands of the long form order for the purpose of showing a basis for his decision and order that was not present when he made his decision and entered his order is an obvious attempt to cure a fatal mistake in the impulsive decision from the bench of Judge Herlands.

Despite such written "Objections" by plaintiff, Judge Herlands signed the long form order as of *December 6, 1957*, but notice of entry was not mailed to plaintiff until *December 9, 1957*.

The long form of order recites that the court read and filed

> "the affidavit of Leo T. Kissam, sworn to November 25, 1957, together with the exhibits annexed thereto, and the affidavit of Joseph M. O'Loughlin, sworn to November 25, 1957, all in opposition to said motion, and after hearing Thaddeus G. Benton appearing pro se, in support of said motion, and Kissam & Halpin, Esquires, by Leo T. Kissam of counsel in opposition to said motion, and upon the stenographer's minutes of the argument of the said motion filed herein * * *".

It then recites that the said motion is denied in its entirety, and is dated as of *December 6, 1957*. It had already been *denied by written order on November 26, 1957*.

It is thus evident that Judge Herlands had reached his decision on the important motion before him impulsively and impetuously, without considering all the facts con-

tained in the carefully written affidavit and Memorandum of the plaintiff. It was natural for him to persist in his order of November 26 in acting upon the long form order on December 6, 1957; but inasmuch as his decision had been firmly made on November 26 it was irregular for him some ten days later to attempt to show a basis for his decision that did not exist on November 26, *i. e.*, the reading of the defendants' counsel's affidavits. *And the record stands clear and positive that he never read plaintiff's moving affidavit and extensive Memorandum thereon.*

The foregoing facts of the proceedings before Judge Herlands are extremely significant as supporting plaintiff's contention that the District Judge not only committed gross error, but that he abused any real discretion he may have, that he did not act judiciously in conducting a real hearing, and that he acted impulsively and impetuously, and erroneously.

THE DECISION OF THE COURT OF APPEALS.

The United States Court of Appeals held (App. 2A) that

> "*It is not at all clear* that the applicable limitation period would not be the same whether the case were tried in the New York or Texas District Court (See Headrick v. Atchison, T. & S. F. Ry. Co., 182 F. 2d 305 (10 Cir., 1950). *It is also not at all clear* from the record that the appellant was not aware of the Texas statute at the time he filed the notice of voluntary dismissal. In any event, ignorance of the Texas limitation period on the part of appellant, an experienced lawyer, is not under the circumstances here disclosed the kind of 'mistake, inadvertence, surprise, or excusable neglect' contemplated by rule 60 (b)".

It is submitted that the Court of Appeals committed grievous error in its three conclusions, ignoring the law as declared by this court, and ignoring the broad purpose of rule 60 (b).

REASONS FOR THE ALLOWANCE OF THE WRIT.

1. The assumption that the "applicable limitation" period might be the same whether the action is tried in New York or Texas *is in defiance of the law as repeatedly declared by this court*, viz., that the law of the state in which the federal court sits is the law of the case; and the Court of Appeals mistakenly relied upon the isolated decision in the *Headrick* case, 10th circuit, which is contrary to fundamental law as determined repeatedly by this court.

2. Inasmuch as the Texas two-year limitation would have barred the action in Texas, and it "might" not "have been brought" there, the order transferring the action to Texas was void.

3. In holding that mistakes of law by the court and a party are not within the purview of rule 60 (b), the Court of Appeals' ruling is a perversion of the manifest purpose of the rule as written by this court.

4. The Court of Appeals abdicated its duty, in not actually adjudicating the issues, and by merely declaring "it is not at all clear" etc., and that "it is not at all clear" etc., without affirmatively determining a basis for its conclusion.

5. District Judge Herlands grossly abused any discretion he might have had.

ARGUMENT.

I. The Texas Two Year Statute of Limitations Would Have Barred the Action, and As It Therefore, "Might" Not "Have Been Brought" in Texas, the Order Transferring the Action There Was Void.

Article 5526, Title 91 on Limitations, Vernon's Civil Statutes of Texas annotated, provides:

> "Actions to be Commenced in Two years.
>
> There *shall be commenced* and prosecuted within two years after the cause of action shall have accrued, and not afterwards, all actions or suits in court of the following description:
>
> 1. Actions of *trespass and injury* done to the estate or the *property of another.*
>
> 2. Actions for detaining the personal property of another.
>
> 3. Actions for taking and carrying away the goods and chattels of another.
>
> * * *"

Certain of the tortious acts of defendant Searls were committed in Texas on December 5, 1953, when defendant's Blair's answer to the complaint by Searls, was filed, on November 19, 1953, when defendant Searls filed the stipulation of Blair not to assign any part of the partnership assets prior to the final disposition of that cause, and in June, 1954, when Searls took the deposition of plaintiff in that action and when Blair gave his deposition. As this action in this court was not commenced until November 27, 1956, by the service of summons—more than two years after such tortious acts of defendant Searls were com-

mitted, it is probable that the two year statute of limitations in Texas applicable to actions for injuries to property would be held applicable—whereas the New York statute of limitations of three years for injuries to property assuredly could not bar this action. (For such facts, see pp. 3-4 of plaintiff's affidavit attached to court's show cause order of June 19, 1957; R. 320-327; App. 7-13.)

The cause of action accrues at the time the tort is committed—not at the time discovered or when actual damage results or is ascertained. *Crawford* v. *Davis*, Civ. App. Tex., 148 S. W. 2d 905.

It is of course expected that as defendant Searls' principal tortious acts were committed in Texas, and as plaintiff's cause of action arose in Texas, the Texas two year statute of limitations would be held to be applicable—the transferee forum, if the action be transferred.

It is to be expected that the Texas courts would hold that the Texas two-year statute of limitations is a complete bar to such action in any Texas court, regardless of how the action arose; and that the Texas courts would impose the bar whether or not the defense were raised by defendants. A cogent reason therefor might well be this fact: Prior to 1939 in Texas it was necessary that a defendant plead the statute as a defense. But, by Article 1939, 46th Leg., p. 201, sec. 1, the following article of Texas law was *REPEALED*:

Article 5540, Title 91, Limitations, Vernon's Civil Statutes of the State of Texas annotated, Vol. 16:

> "*Limitation must be pleaded.* The law of limitation shall not be available in any suit unless it be specifically set forth by the party who in his answer invokes it as a defense."

It therefore seems likely that a Texas court, on a cause of action arising in Texas, would construe the law to be an absolute bar to an action commenced more than two years after the commission of the tort, whether or not the defense were interposed by the defendant.

The statute, by the word "trespass" includes all tortious acts amounting to a transgression of the rights of another as to his property, although some act must be done. *Davies* v. *Texas Central Ry. Co.*, 62 C. A. 599, 133 S. W. 295. It would undoubtedly cover the causes of action pleaded in the amended complaint.

So that, there being substantial risk that plaintiff's rights would be held by the Texas court to be barred, there is substantial and effective reason why the action should not be transferred. As stated so well by the District Court in New York (Judge Weinfeld) in *Curry* v. *States Marine Corp. of Del.*, D. C. N. Y. 1953, 118 F. Supp. 234:

> "If the motion were granted, this would result according to the defendant in the dismissal of the plaintiff's suit since it was not brought within one year period under the Louisiana law. WHILE DEFENDANT MAY BE WRONG ON THE LAW, PLAINTIFF SHOULD NOT BE EXPOSED TO SUCH A POSSIBILITY."

Certainly the plaintiff in this action should not be exposed to the great risk that the Texas two year statute of limitations would bar his action, in the light of the vast uncertainty of the application of conflict of laws.

In *Broughton* v. *Shoulders*, 116 F. Supp. 391 (W. D. Ky. 1953), an action instituted in New York arising out of an automobile collision in Kentucky, was transferred to Kentucky. It was held that the "matter of jurisdiction has

been determined by the judge of the Western District of New York and is the law of the case"; that the "Western District of Kentucky therefore becomes both the place where the cause of action arose *and the forum in which the litigation* is to be concluded"; that

> "since the lexi fori and the lex loci are both in Kentucky we must look to the authorities of the court of last resort in this state to determine what should be the proper ruling on the motion to dismiss. It seems well established that the law of the forum governs, whether the action is ex contractu or ex delicto. The plaintiff's complaint shows a common law right of recovery and the one year statute of limitations (of Ky.) necessarily controls. Louisville & Nashville R. R. Co. v. Burkhart, 154 Ky. 92, 157 S. W. 18, 46 L. R. A., N. S., 687; Lewis v. Reconstruction Finance Corp., 85 U. S. App. D. C. 339, 177 F. 2d 654; Travelers Insurance Co. v. Mahon, 273 Ky. 691, 117 S. W. 2d 909; Wells v. Simonds Abrasive Co., 345 U. S. 514, 73 S. Ct. 856."

In *Wells* v. *Simonds Abrasive Co.*, 345 U. S. 514, 73 S. Ct. 856, in an action brought in Pennsylvania federal court for injuries sustained in Alabama caused by a Pennsylvania corporation, it was held that the Pennsylvania statute outlawing such action after one year governs—the law of the forum, despite the fact that the Alabama wrongful death statute permitted a suit within two years. It was held that the Pennsylvania statute governing conflicts of law does not violate the full faith and credit clause of the Constitution. So that in the case at bar, the New York three year statute would govern if New York remains the forum; but if the action is transferred to Texas, and Texas becomes the forum, there can be little or no doubt that the Texas courts would hold that the Texas statute of limitations applies.

II. Neither the District Court nor Plaintiff Awakened to the Hazard of the Texas Statute of Limitations Until After Plaintiff Discontinued the Action.

This fact is shown above in the Statement of the Case, and by plaintiff's two affidavits, the first supporting the motion, and the second filed thereafter (App. 3rd and 4th items, pp. 7-16).

There is not one word in the record indicating that anyone had thought of the bar of the Texas statute of limitations, until plaintiff's motion for relief was served. If it had been raised, certainly plaintiff would have cited the Texas statute and the New York statute, as a cogent reason why the action should not have been ordered to be transferred. The attempted showing by Mr. O'Loughlin, of counsel for defendants, that Judge Ryan raised the question is, therefore, wholly incredible—and as incredible as are the numerous representations made to Judge Herlands by Mr. Kissam orally at the hearing on this motion—shown hereinabove to be misrepresentations.

The most convincing proof that the Texas statute of limitations was not observed by the parties or by the court is the fact that Judge Ryan's opinion is barren of any suggestion of it.

Such inadvertence and mistake of fact, and of a legal consideration, are perfect reasons for relief under Federal Rule 60(b), and should be controlling in the disposition of the instant motion.

Moreover, the basis of Judge Herlands' decision was *his unqualified assumption that the accrual of the cause of action occurred more than the two years before the commencement of this action* (App. 31, 36). This court will, therefore, accept that as a fact.

III. The Transfer Statute (Sec. 1404, Title 28, U.S.C.) Does Not Permit the Transfer of the Action to Texas Because It Is Not a "District or Division Where It Might Have Been Brought."

The statute reads:

> "(a) For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division *where it might have been brought.*"

The statute is positive that an action may not be transferred to a district where it might *not* have been brought. That limitation is controlling, for we have shown that because of the Texas two-year statute of limitations this action was barred in Texas. That limitation has been uniformly recognized by all the courts by the innumerable reported decisions in cases where the statute of limitations of the transferee district would bar the action but could be waived; but in Texas the bar of the statute of limitations is absolute.

IV. The Law of the State in Which the Federal Court Sits (Texas) Is the Law of the Case If the Action Be Transferred to Texas; and the Decision in Headrick v. Atchison Is an Isolated, Single and Incorrect Decision.

Respondents' reliance solely upon *Headrick v. Atchison, T. & S. F. Ry.*, 182 F. 2d 305 (10th Cir. 1950), for the alleged point that the statute of limitations of the transferror state governs in a removal action—and not the statute of limitations of the transferee state—is erroneous and abortive. The decision cannot stand—certainly not on the facts of this case. It is overcome by numerous Supreme Court decisions to the contrary.

Appellant has shown that the Texas laws bars the commencement and prosecution of any such action in Texas after two years from the time the right of action accrued, and that the defense need not be pleaded. Such law is thus a substantive law in Texas, and there is no power in Congress to change that law as to actions to be tried in the Texas forum.

The law of the forum *where the court sits*—and where the action is litigated and tried—governs. *Wells* v. *Simonds Abrasive Co.*, 73 S. Ct. 856-858, 344 U. S. 815; 345 U. S. 512, 97 L. Ed. 634, 1211; *Hartwell* v. *Piper Aircraft Corp.*, 92 F. Supp. 271 (M. D. Pa.); *Zellmer* v. *Acme Brewing Co.*, 184 F. 2d 940, 942 (9th Cir.).

In a New York court, the New York two-year statute of limitations governs for an action based on a Pennsylvania wrongful death in which state the limitation period is one year, but if the forum were Pennsylvania, there could be no doubt that the Pennsylvania statute of limitations would apply. *Panzeron et al.* v. *Heath et al.*, 95 N. Y. S. 2d 660, 662, 197 Misc. 847.

In a federal court action, the statute of limitations of the state *in which the court sits controls*—not the statute of the state where the tort was committed. *Carpenter* v. *Rohm & Haas Co., Inc.*, 75 Fed. Supp. 732, 734 (Del.); *Florida Wholesale Drug, Inc.*, v. *Ronson Art Metal Works*, 110 F. Supp. 573, 574, 575 (N. J.).

In *Wells* v. *Simonds Abrasive Co., supra*, it was held that, in an action brought in Pennsylvania, the Pennsylvania conflict of laws rule does not violate the full faith and credit clause, there being no reason to graft an exception, as concerns foreign statutory rights, upon the general rule that the full faith and credit clause *does not compel the forum state to use the period of limitations of a foreign state.*

That is the Supreme Court's decision. Hence, in the action at bar, if it be transferred to Texas, the Texas courts must apply the statute of limitations of Texas.

The rule is applicable in Texas. *Griffin* v. *McCoach*, (1941) 313 U. S. 498, 61 S. Ct. 1023, 85 L. Ed. 1481, was an action in the Texas federal court, involving the question whether the estate or a trustee was entitled to certain insurance proceeds paid by Prudential Insurance Co. The court held:

> "For the reasons given in *Klaxon* v. *Stentor Electric Mfg. Co.*, No. 741, this term, decided today (313 U. S. 487, ante 1477, 61 S. Ct. 1020) we are of the view that the federal courts in diversity cases *are governed by the conflict of laws rules of the courts in which they sit.*"

Further, the Supreme Court said:

> "If, upon examination of the Texas law, it appears that the courts of Texas would refuse the enforcement of an insurance contract where the beneficiaries have no insurable interest on the ground of interference with local law, such refusal would be, in our opinion, within the constitutional power of the Texas courts. Rights acquired by contract outside a state are enforced within a state, certainly where its own citizens are concerned, *but that principle excepts claimed rights so contrary to the state of the forum as to subvert the forum's views of public policy.* * * *
>
> "Where this court has required the state of the forum to apply the foreign law under the full faith and credit clause or under the 14th amendment it has recognized that a state is not required to enforce a law obnoxious to its public policy." (citing cases) * * *
>
> "It is for the state to say whether a contract contrary to such a statute or rule of law is so offensive to its view of public welfare as to require its courts to close their doors to its enforcement."

Here, the state of Texas has expressed its public policy requiring all actions to be "commenced and prosecuted within two years after the cause of action shall have accrued", and Texas has thus said that it will not enforce the rights involved in this action if Texas should become the forum.

Beale on "The Conflict of Laws" (1935), states the rules:

> "Section 604.6. *Statute of Limitations in federal courts.* In an action at law a federal court will apply, in the absence of any applicable federal statute, *the statute of the state in which it sits. Bluefields S. S. Co.* v. *United Fruit Co.*, 243 Fed. 1 (1917); *U. S.* v. *Sligh*, 24 F. 2d 636 (1928); *Watkins* v. *Madison Trust and Deposit Co.*, 24 F. 2d 370 (1928); *Weems* v. *Carter*, 30 F. 2d 202 (1929)."
>
> "Section 584.1, p. 1600.
>
> "It has now become axiomatic that substantive matters are governed by the foreign law, and that procedural matters, or, as it is more usually expressed, *matters relating to the remedy are governed by the law of the forum.*"
>
> "Section 603.1. *Statute of Limitations of Forum.*
>
> "That the statute of limitations of the forum is the applicable law of limitations is so well settled, in Anglo-American law at least, as to be beyond dispute. *M'Clung* v. *Silliman*, 5 Peters 270, 7 L. Ed. 190 (1830); *Hanger* v. *Abbott*, 6 Wall. 532, 18 L. Ed. 939 (1867); *Michigan Insurance Bank* v. *Eldred*, 130 U. S. 693, 32 L. Ed. 1080" (and cases in Illinois, Kentucky, Louisiana, Missouri, Mississippi, New York, Oklahoma and Vermont).

For the same principle, *Erie* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, was followed in *Klaxon* v. *Stentor*

El. Mfg. Co., (1941) 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477, decided the same day as *Griffin* v. *McCoach*, *supra*.

The *Klaxon* case involved directly the question whether a federal court in a diversity case must follow the conflict of laws rule prevailing in the *states in which they sit*. It involved a suit in the Delaware federal court on a contract executed in New York, and the Delaware federal court allowed interest on the contract under the New York law. The sole question was whether the New York law was applicable, or the Delaware Law. The Supreme Court held:

> "The conflict of laws rule to be applied by the federal court in Delaware must conform to those prevailing in Delaware state courts." (citing *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487). "Any other ruling would do violence to the principle of uniformity within a state upon which the Tompkins decision is based. Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. *It is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws.* Subject only to review by this court on any federal question that may arise, Delaware is free to determine whether a given matter is to be governed by the law of the forum or some other law. * * * *And the proper function of the Delaware court is to ascertain what the state law is, not what it ought to be.*"

The decision was reversed, for decision in conformity with the law of Delaware.

Further authorities that the law of the forum governs are:

Levy v. *Simmons et al.*, 249 S. W. 2d 808 (Ky.).

Merchants & Planters Nat. Bank v. *Appleyard*, 77 S. E. 2d 783, 785, 238 N. C. 145.

Foley v. *Pittsburgh-Des Moines Co. et al.*, 68 A. 2d 517, 363 Pa. 1.

Zellmer v. *Acme Brewing Co.*, 184 F. 2d 940, 942.

Fla., Wholesale Drug, Inc., v. *Ronson Art Metal Works, Inc.*, 110 F. Supp. 573-5.

Anderson v. *Linton*, 178 F. 2d 304, 310 (7th).

Guarantee Trust Co. v. *York*, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079, is another leading authority, following the *Erie, Klaxon* and *Griffin* decisions, *supra*. It was held that if a plea of limitations would bar a suit in a state court for equitable relief, a federal court whose jurisdiction rests upon diversity of citizenship ought not to afford relief; that the federal courts have not differentiated in

> "their regard for state law between actions at law and suits in equity. Although section 34 of the Judiciary Act, 1789, 1 Stat. 73, 92 c. 20, 28 U. S. C. A., Sec. 725, 8 F. C. A., Title 28, sec. 725, directed that the laws of the several states * * * shall be regarded as rules of decisions in trials at common law * * * this was deemed, constantly for over a hundred years, to be merely declaratory of what would in any event have governed the federal courts and therefore was equally applicable to equity suits."

> "Such particular rules of local law, however, do not in the slightest change the crucial consideration *that if a plea of the statute of limitations would bar recovery in a state court, a federal court ought not to afford recovery.* * * *"

It held that even before *Erie* v. *Tompkins*, the federal courts relied on statutes of limitations "of the state *in which they sit*. In suits at law state limitations statutes were held to be 'rules of decision' within section 34 of the Judiciary Act of 1789 and as such applied in trials at common law * * *

whenever that law is authoritatively declared by a state, whether its voice be the legislature or its highest court, such law ought to govern litigation *founded on that law, whether the forum of application is a state or a federal court* and whether the remedies be sought at law or may be had in equity."

The *York*, *Erie* and *Klaxon* authorities, *supra*, were followed by Judge Murphy (D. C. N. Y.) in a long, well written opinion in *Warner* v. *Republic Steel Corp.*, 103 F. Supp. 998, 1004 (1952), *in holding that the conflict of laws rule of the state in which the federal court sits must govern.*

There is thus no question that if this action be not retained in this jurisdiction, but be transferred to Texas, the Texas statute of limitations would bar the action, and that appellant's right of action would be destroyed; and appellant would be denied the Constitutional and statutory right to prosecute his claim in the jurisdiction of his residence.

Thus, the impetuous denial by Judge Herlands of plaintiff's motion would represent the destruction of plaintiff's right of action valued at $1,000,000, and would do violence to the "interest of justice" test in the transfer statute. Judge Ryan's and appellant's and his counsel's mistake of the law, and inadvertence, is properly the subject of correction by the authority of F. R. C. P. 60(b).

A cogent, confirmatory authority for the fact that the statute of limitations of the transferee state would apply consists of the innumerable decisions of the United States District Courts refusing to transfer cases unless the defendant should expressly waive the statute of limitations of the transferee state; and, in this case, the Texas statute of limitations is one that cannot be waived.

V. While Purporting to Assume All Plaintiff's Statements in Argument to Be True, and That He Had Considered the Whole Record (Which He Had Not Done), Judge Herlands' Decision Inconsistently and Contrarily, and Impulsively, Was That Judge Ryan and Appellant Had Not Made a Mistake in Overlooking the Application of the Texas Statute of Limitations—Without Any Basis Whatever Therefor. The Judge Was Misled by the Misrepresentations by Appellees' Counsel.

Those factual statements are abundantly proved by the transcript of the hearing (App. 34-37).

The written record shows the most impulsive and impetuous, and uninformed and inconsistent action imaginable by a trial judge, and one largely induced by misrepresentations of material facts by appellees' counsel. To say that appellant did not receive a fair hearing, on the facts of record would be to minimize the gravity of the trial judge's actions.

VI. The Court of Appeals Did Not Adjudicate the Issues, But Reached Its Conclusions on a Negative Assumption that the New York Statute of Limitations Might Apply Whether the Action Be Tried in New York or Texas, in Contradiction of Fundamental Law As Repeatedly Announced by This Court.

The Court of Appeals' statement that "It is not at all clear" that the applicable limitations period would not be the same whether the case were tried in New York or Texas District Court is a simple avoidance of adjudication and avoidance of duty to determine a critical issue.

It is abundantly shown hereinabove by controlling decisions of this court that the statute of limitations of Texas

where the case would be tried would control. It is Texas, and not the federal government that has plenary authority to determine what actions may be maintained in Texas; and the effect of the decision below is to deny to Texas its authority.

VII. Judge Herlands Grossly Abused Any Discretion He Could Have Had. While Purporting to Assume All Plaintiff's Statements in Oral Argument to Be True, and That He Had Considered the Whole Record (Which He Had Not Done), Judge Herlands Decision Inconsistently and Contrarily, and Impulsively, Was That Judge Ryan and Appellant Had Not Made a Mistake in Overlooking the Application of the Texas Statute of Limitations—Without Any Basis Whatever Therefor. The Judge Was Misled by the Misrepresentations by Appellees' Counsel.

Those factual statements are abundantly proved by the transcript of the hearing (App. 34-37).

That written record shows the most impulsive and impetuous, and uninformed and inconsistent action imaginable by a trial judge, and one largely induced by misrepresentations of material facts by respondent's counsel. To say that petitioner did not receive a fair hearing, on the facts of record as disclosed in petitioner's brief in the court below, would be to minimize the gravity of the trial judge's actions.

Even if Judge Ryan had inquired into the possible application of the Texas statute of limitations, the controlling fact is that the judge and the plaintiff had made a mistake in not recognizing that the Texas law would bar the action in Texas.

Certainly the District Court would not have ordered the action transferred to Texas if it had known that the

Texas statute of limitations would bar the action, for sec. 1404, Title 28, U. S. C., did not authorize such a transfer, as the action could not "have been brought" in Texas. Therefore, a mistake occurred, for even if the question had been raised there was a mistake of fact and law in not observing that the action would be barred.

Certainly it is not in the interest of justice to force a plaintiff, a New York citizen, having the right to file his action in New York within the time allowed there, to litigate his claim in Texas where it would be barred. That is a complete answer to appellees' claim that Judge Ryan had inquired about limitations; and respondents have not sustained their assertion that Judge Ryan did inquire into the question, and they have not even attempted to show facts or law that the Texas limitation period is not operative.

Judge Herlands did not read petitioner's moving affidavit, or memorandum, or any of the ten documents upon which he expressly relied, but, after impulsively announcing his decision from the bench on November 26, 1957, tried to cure the defect on December 6, 1957 (after petitioner had filed notice of appeal from the order of November 26, 1957), by entering a long form order reciting that the court had read the affidavits of Messrs. Kissam and O'Loughlin *which it had not done when reaching its decision*. The court's glaring error and abuse of his discretion is proved by the fact that he did not at any time read petitioner's moving affidavit, his memorandum, or the ten documents in the record upon which he relied (App. 8-13; 17-36).

In an endeavor to excuse their inducement of the court to sign a long form faulty order after plaintiff's notice of appeal was filed, respondents cited the cost bond reciting that the appeal was from the long form or-

der of December 6, 1957, whereas they should have correctly informed the court that the notice of appeal was actually from the order of the court of November 26, 1957 (R. 482). The long form order was an obvious attempt to cure a fatal mistake in the impulsive decision of Judge Herlands from the bench, and petitioner has referred to it as proof of the judge's abuse of discretion in his impulsive action of November 26, 1957.

The court's impetuous decision was induced largely by respondent's counsel's misstatements of nine critically material facts and the court did not inquire into or resolve the true facts. Yet his conclusions are permeated with reflections showing that he had absorbed such erroneous, critically material facts.

Judge Herlands *assumed that the statute of limitations had not been considered before Judge Ryan*, but thereupon contrarily and wholly inconsistently, and without any factual basis whatever concluded: "I don't think there was a mistake." (App. 36, R. 480). His judgment therefore was capricious, and contrary to the facts he actually assumed.

With utter abandon, he declared that he had considered

"*the affidavits here*" and "*the total record*"

which is simply untrue. It was impossible for him to do it in less than the half hour of hearing counsel (App. 36; R. 481).

There is especial significance in the fact that in respondent's reply brief, their counsel could not, or even attempt to, excuse himself of his misstatements of critically important facts to Judge Herlands which induced the judge's decision.

Such a hearing, with all the recorded misstatements and misrepresentations inducing the court's impulsive action, is conclusive that the court abused any discretion it might have had.

Petitioner was denied the fair hearing to which he was entitled, and the court's erroneous judgment should be reversed.

VIII. Federal Rule 60 (b) Affords Relief from Mistakes of Law As Well As Facts, It Should Be Construed Liberally, and All Doubt Should Be Resolved in Favor of the Applicant for Relief to the End of Securing a Trial upon the Merits.

Rule 60 (b) was taken almost literally from section 473 of the California Code. The California decisions recognized that section 473 was a remedial statute and is to be construed liberally and broadly (*Moore's Federal Practice*, Second Edition, volume 7, par. 60.10 (6)).

Moore states further:

> "The mistake upon which relief may be granted may *be mistake of law as well as mistake of fact* and need not be mutual."

Cases cited are:

Mitchell v. *Calif. & O. C. SS*, (1909), 156 Cal. 576, 105 Pac. 590; *Waite* v. *Southern Pac. Co.*, (1923) 192 Cal. 467, 221 Pac. 204; *Peterson* v. *Holden*, (1920) 45 Cal. App. 278, 187 Pac 99; *Kammerer* v. *Marino*, (1924) 66 Cal. App. 720, 226 Pac. 680; *Roehl* v. *Texas Co.*, (1930) 107 Cal. App. 708, 291 Pac. 262; *J. A. Vaughan Corp.*, v. *Title Ins., etc., Co.*, (1932) 123 Cal. App. 709, 12 P. 2d 117. *where the attorneys were mistaken as to the law.*

Moore states further:

> "The California courts have also liberally construed the words 'excusable neglect' and 'inadvertence' ". (Moore, p. 18.)

Any and all doubt should be resolved in favor of the applicant—the petitioner here: *Jergins* v. *Schenck*, (1912) 162 Cal. 747, 124 Pac. 426:

> "ANY DOUBT THAT MAY EXIST SHOULD BE RESOLVED IN FAVOR OF THE APPLICATION, TO THE END OF SECURING A TRIAL UPON THE MERITS. The appellate court will therefore be less inclined to reverse an order granting, than one refusing an application to open a default. Indeed, the cases in which this court has held that such relief was improperly granted are very rare; while in a number of instances an order refusing to open the default has been reversed."

Moore's Federal Procedure shows further (sec. 60.10 (9)):

> "Construction of original rule 60 (b) that was warranted by California decisions.
>
> From the California decisions it was reasonable to construe original rule 60 (b) as follows:
>
> 1. *The rule is remedial in nature and should be construed liberally.*"

The Rule Applies to Mistakes of the Court As Well As to Mistakes of Parties and Counsel.

The original rule 60 (b) provided for the relief from the mistake of the litigant only, the words being "*his* mistake, inadvertence" etc., but the word "his" was eliminated in the rule as it reads now, *so as to include the mistake of the court or the party* (Moore's, par. 60.18 (3); also p. 236).

Moore urges that "the courts should and do give a liberal construction to rule 60 (b)", citing numerous cases (Par. 60.18 (8)).

This Court long ago held expressly that "this court possesses the power to reinstate any cause *dismissed by mistake.*" *The Palmyra*, (1827) 12 Wheat. 1, 6 L. Ed. 531. There, an appellate court dismissed an appeal on the ground that no final decree had been entered in the court below, but at the next term of court a corrected transcript was adduced showing that there had been a final decree which the clerk, through mistake, had failed to include in the record, and the appellate court permitted the reinstatement of the appeal.

In *Robbins* v. *Pitcairn*, (N. D. of Ill. 1940) 3 Fed. Rules Serv. 60 b. 21, case #2 (Judge Barns), it was held that the court may relieve a party from an order against him through an excusable *mistake of law* on the part of his attorney as to the jurisdiction of the court. The court set aside its order dismissing the action for want of prosecution, by reason of the mistake of law of the attorney for the plaintiff.

Judge Hincks when United States District Judge for the District of Connecticut in 1940 held in *Nachod & U. S. Signal Co.* v. *Automatic Signal Corporation*, 32 F. Supp. 588 (before the rule 60(b) was amended) that an order may be set aside for the mistake or inadvertence of the party only. The rule now covers any mistakes by the court, party or counsel; and in this action there was involved the mistake of the court, appellant and counsel.

In *Stentor Electric Manufacturing Co.* v. *Klaxon*, (D. Del. 1939), Fed. Supp. 425, the court amended the judgment on a breach of contract action to include interest so as to comply with the law of the appropriate state. It was affirmed (C. C. A. 3rd), 115 F. 2d 268.

Judge Leibell similarly held that failure to include interest in a judgment (error of law) may be corrected on motion as an "oversight or omission" under rule 60 (b), *Rigopoulas* v. *Kernan*, (S. D. N. Y. 1943) 53 F. Supp. 829, citing the *Stentor* decision, *supra*, and *Quinn* v. *Sigretto*, 229 App. Div. 727, 241 N. Y. S. 835.

The broad and liberal purpose of rule 60 (b) was recognized by Chief Judge Clark, in holding that the court's power to grant an amendment of a complaint after affirmance of a dismissal thereof is found in amended rule 60 (b). See concurring opinion in *Feuerstein* v. *Zukor*, (2nd Cir., 1949) 174 F. 2d 371; see also to same effect, *Von Wedell* v. *McGrath*, (D. C. N. J., 1951) 100 F. Supp. 434, 16 F. Rules Serv. 15 a-24, case 1, affirmed 180 F. 2d 716, certiorari denied (1950) 340 U. S. 816.

The authority of the *Feuerstein* decision is parallel to the situation presented on this appeal. In the *Feuerstein* case the court had affirmed the dismissal of the action; *here there was only a voluntary dismissal.* The decision of the court below that the mistake in this case is not the kind of "mistake, inadvertence" contemplated by the rule is, therefore, contradictory of Chief Judge Clark's opinion in the *Feuerstein* case, and should be withdrawn.

It is thus shown that the mistake or inadvertence by the court, appellant and counsel in not observing the application of the Texas statute of limitations is a simple mistake of fact and law, and that appellant should not be forever deprived of his substantive rights by reason of such mistake.

The Court's conclusion (without expressed analysis of the facts) that Judge Herland's "discretion was not improperly exercised here" is erroneous. It would condone the most impulsive, uninformed, precipitous, impetuous

and inconsiderate exercise of a discretion imaginable by a trial court. His declination to read the motion and accompanying affidavit, the papers made a part thereof and the brief—and in accepting *the facts as misrepresented to him in argument by appellee's counsel*—is as fatal as would be the action of a trial judge, in a criminal case, in omitting to read the indictment or the documentary evidence. Judge Herlands' action reeks with such contradictions, inconsistencies, misinformation, and lack of knowledge of the facts as to compel the conclusion that he abused his discretion. His declination to inform himself of all of the facts, after listening to facts as misrepresented by appellee's counsel, is wholly inimical to a fair hearing. His actions do not admit of any other conclusion. The Supreme Court reconfirmed the rule in *Klapprott* v. *U. S.*, 335 U. S. 601, 93 L. Ed. 266, in referring to rule 60(b):

> "Fair hearings are in accord with elemental concepts of justice * * *."

It is the prevailing practice of the District Judge sitting in motion court where 100 to 150 motions are called on motion day to hear very brief argument, and then to say "I'll take the papers", meaning that the court intends to act considerately upon all the papers and with informed discretion obtained therefrom, which was lacking in this case. Instead Judge Herlands was influenced by the facts misrepresented to him by appellee's counsel, as shown in our briefs.

Certainly the impulsive and uninformed action of Judge Herlands does not constitute the informed discretion required by the rule, for he did not read the pertinent papers then before him or on file, and was misguided by misrepresentations of critically material facts by appellee's counsel. It cannot be said, therefore, that he was not in-

fluenced by certain of the facts as misrepresented, or that he considered the correct facts as to which he saw fit not to inform himself. He did not take time to inform himself of all the facts, or the true facts.

We submit that when the acts of Judge Herlands are analyzed in the light of the facts as misrepresented to him, and all the credible facts, the facts thereof compel the conclusion that he did abuse his discretion.

The best proof that petitioner and the District Court were not aware of the Texas limitations is the affidavit of appellee's counsel. Mr. O'Loughlin (Appellee's Appendix, p. 65). While petitioner is convinced that Mr. O'Loughlin is mistaken in declaring that Judge Ryan raised the question, Mr. O'Loughlin freely admits on oath that appellant "made no claim that any such question was involved in this case", thus proving that appellant had made the mistake through inadvertence of overlooking the application of the Texas statute of limitations. Certainly the appellant would have presented the facts and the law if it were known that the Texas limitations would apply, for in such event there would have been no authority to transfer the action.

And Judge Herlands freely assumed that "there is not one word in this record anywhere that the statute of limitations was considered by Judge Ryan or by petitioner prior to appellant's motion for relief under rule 60 (b)". (Appendix 36).

Judge Herlands' assumption on that point should be controlling; and it proves his capricious action in ruling that there was no mistake, in effect—*a totally irreconcilable and contradictory position* (App. 36).

There is thus no reasonable or logical basis for doubting that the petitioner and the court had not considered

the Texas limitations, until appellant sought relief under rule 60 (b). But even if there were some question of doubt, it is wholly immaterial because appellant has shown that, as matter of law, the District Court made a mistake in not observing that the Texas limitations would have prevented the action from being brought in Texas, and that there was thus no authority to transfer the action.

The policy of the law and of rule 60 (b) requires that legal rights and the right of trial be preserved as against mistake and inadvertence; rather than that they be destroyed as a result of an unwitting act or inadvertence of the trial court and of the plaintiff.

We most sincerely urge that the court below omitted to make the *adjudication* of the critical questions involved, on the facts and the law; and submit that, upon such adjudication, it must be concluded that the order of Judge Herlands should be reversed to prevent a travesty upon justice.

CONCLUSION.

It is respectfully submitted that the District Court and the Court of Appeals have ignored the rule, long established by this court, that the statute of limitations of the state of the forum governs, and that if the transfer stands in this action an erroneous judgment of the court will destroy petitioner's rights; that the Court of Appeals has ignored the limitation of section 1404 (a), Title 28, U. S. C., that an action may not be transferred to a state where it might not have been commenced; that the District Judge abused his discretion in applying Federal Rule 60 (b); and that the Court of Appeals failed to make a real adjudication of the issues as required.

Unless this court reviews and reverses the decision below, petitioner's rights to a Constitutional adjudication on the merits of his action against respondents will be forever lost, by the mistake and inadvertence of the court and counsel, which it is the avowed purpose of Federal Rule 60 (b) to prevent.

Respectfully,

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